Supreme Court, U.S.
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No. 99-1702

In the Supreme Court of the United States

STATE OF TEXAS,

Petitioner,

v.

RAYMOND LEVI COBB,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF OF 19 STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Capital Case

QUESTIONS PRESENTED

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986), and *Patterson v. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

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STATEMENT OF *AMICI* INTEREST

The State of Ohio and 18 other amici States and Territories write to urge the Court to grant certiorari in this case. At stake is the scope of the Sixth Amendment right to counsel where one suspect has committed two distinct – although temporally related – crimes. Some lower courts, including the Texas Court of Criminal Appeals in this case, have misinterpreted this Court's holding in *McNeil v. Wisconsin*, 501 U.S. 171 (1991), by overlooking the "offense specific" nature of the Sixth Amendment. Just because a suspect's right to counsel has attached in connection with one of his crimes, the Sixth Amendment does not appear to bar the police from inquiring about all others. In addition, some lower courts, again including the lower court here, have expanded this Court's holding in *Michigan v. Jackson*, 475 U.S. 625 (1986), by finding an "assertion" of the right to counsel where an accused has made no affirmative statement at all about his need for legal help.

Two vital societal interests of importance to the States are at issue here: (1) the States' prerogative to investigate crime and convict the guilty and (2) the States' (sometimes countervailing) interest in protecting their citizens from police "badgering." These concerns are of particular moment where, as here, one person is accused of two factually related but legally distinct offenses. When can an accused effectively and voluntarily waive his right to counsel with respect to a particular offense after earlier accepting the appointment of counsel for another criminal charge? Where a properly Mirandized suspect is willing to talk about Crime A, are police forever barred from questioning him about it simply because a court has already appointed counsel for that suspect concerning Crime B? The States earnestly seek clear direction from the Court in this area of the law, which is now marked by considerable uncertainty and by conflicting

rulings in the lower courts. We therefore urge the Court to review the judgment below.

REASONS FOR GRANTING THE WRIT

Presented in this case is a new twist on the prophylactic rule of *Michigan v. Jackson*, 475 U.S. 625 (1986). Under *Jackson*, once a criminal defendant has asserted his right to counsel at an arraignment or similar proceeding, the police may not interrogate him without first securing the approval of his attorney. Even if the defendant knowingly and voluntarily agrees to the interrogation, *Jackson* bars the questioning, absent the consent of the defendant's attorney.

This case differs from the *Jackson* situation in two key respects, however. First, the police questioning at issue here concerned murder offenses that were legally distinct from – though factually related to – a previously-charged burglary offense on which defendant Cobb had earlier been arraigned, whereas *Jackson* concerned interrogation about the one and only crime with which the defendant in that case stood charged. Second, the defendant in this case merely accepted the appointment of counsel at his arraignment on the burglary charge, whereas the defendant in *Jackson* affirmatively requested counsel at his arraignment.

Once defendant Cobb had been appointed counsel on the burglary charge, could he, without first consulting his appointed attorney, knowingly and intelligently agree to police questioning about two unsolved murders? The Texas Court of Criminal Appeals said "no," finding that Cobb's Sixth Amendment right to counsel had attached to the murder charges once Cobb was arraigned on the burglary charge. That judgment now merits review.

I. The Court Should Grant Certiorari To Clarify That The Sixth Amendment Right To Counsel Is Offense Specific, And Police Are Not Barred From Interrogating A Suspect About A Crime Simply Because He Already Has Counsel For Some Other Criminal Charge.

Confusion haunts state and federal courts regarding the scope of the Sixth Amendment right to counsel where one suspect is implicated in two offenses. No case could better illustrate that confusion – and its destructive consequences – than this one. Respondent Cobb voluntarily confessed to two counts of capital murder after law enforcement officers fully explained his *Miranda* rights to him. However, because counsel had already been appointed for Cobb on a related burglary charge (unbeknownst to the officers to whom he confessed in another county), and because the interrogating officers failed to secure the attorney's permission before questioning Cobb about the murders, Cobb's confessions have been thrown out and his convictions vacated.

Let there be no mistake in this case: the murder charges are in no way predicated on the burglary. Neither Texas law nor the record disclose any element of the murder offenses that would also constitute an element of the previously-charged burglary offense (save the venue and date), and likewise, no element of the burglary offense overlaps with the essential elements of the murder charges. While the murders occurred during a sequence of events starting with defendant Cobb's burglary of a home, those murders remain factually and legally distinct from that first offense.

Under *McNeil v. Wisconsin*, the Sixth Amendment right to counsel is "offense specific." 501 U.S. 171, 175 (1991). Thus, in this case, the trial court's appointment of counsel for Cobb at his arraignment on the burglary charge

was limited to that charge alone, not to other offenses that he may have committed. The Texas Court of Criminal Appeals should have so held, thereby preserving the law enforcement officers' authority to investigate other crimes apart from the burglary, and allowing them to interview Cobb about other crimes if he knowingly and intelligently agreed to speak with them.

Instead, the court below applied a lawyer-for-one/lawyer-for-all approach to the additional criminal charges for which Cobb later became a suspect. The court cited what it described as a "Sixth Amendment rule that once the right to counsel attaches to the offense charged, it also attaches to any other offense that is *very closely related factually* to the offense charged." Pet. App. at A-6 (emphasis added). In deciding whether the burglary charge and two capital murder offenses involving separate conduct and completely different elements constituted "very closely related" offenses, the Texas court observed only that the murders were "factually interwoven" with the burglary. Pet. App. at A-7.

The Texas court's error stems in part from analysis developed by lower courts before this Court's decision in *McNeil*. Those earlier decisions in turn rested on this Court's decisions in *Brewer v. Williams*, 430 U.S. 387 (1977), and *Maine v. Moulton*, 474 U.S. 159 (1985). In *Brewer*, the suspect incriminated himself when the police – who had promised the suspect's lawyer that they would not question the suspect – prompted him to talk while riding in a police cruiser after his arraignment. That defendant already had a lawyer for a pending abduction charge, and he never agreed to waive his *Miranda* rights before talking with the police in the car. The Court found his incriminating words and actions inadmissible in a related murder case. In *Moulton*, police obtained admissions by surreptitiously recording a defendant's conversations with a co-defendant after the

defendant had been charged with theft and after a lawyer had been appointed for him. Again, this Court set aside the admissions and resulting convictions, holding that the police had violated the defendant's Sixth Amendment right to counsel. Those two cases together bar the government from "obtain[ing] incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Moulton*, 474 U.S. at 176.

In an effort to reconcile *Brewer* and *Moulton* with *Michigan v. Jackson*, 475 U.S. 625 (1986), and later with *McNeil*, state and federal courts weighing the Sixth Amendment rights of defendants facing multiple criminal charges have developed the "inextricably intertwined" or "related offenses" test as an exception to the "offense specific" holding of *McNeil*. In other words, when two offenses seem closely tied, courts are more likely to find that a lawyer who represents a defendant for his role in one offense also automatically represents him for any possible related cases, even though *McNeil* describes the Sixth Amendment as offense specific.

This Court has never determined whether this post-*McNeil* melding of legal representation for related offenses (and the resulting ban on police interrogation for the second offense, even where the accused knowingly and voluntarily wishes to speak with the authorities) is compelled by the Sixth Amendment. As one lower court has said, the "precise boundaries of the offense-specific limitation have yet to be fleshed out." *People v. Clair*, 828 P.2d 705, 721 (Cal. 1992), *cert. denied*, 506 U.S. 1063 (1993), quoting *McNeil*, 501 U.S. at 187 (Stevens, J., dissenting).

Unfortunately, that uncertainty has led to a result that does not advance the States' interest in protecting citizens from police overreaching (for here, the defendant knowingly

and intelligently agreed to speak with the police about the murders even though – unbeknownst to them – he already had a lawyer on his separate burglary charge), and surely frustrates Texas's interest in punishing a murderer (for the judgment below tossed out Cobb's confession and convictions). That outcome cannot be reconciled with *McNeil*'s requirement that the prophylactic Sixth Amendment protection articulated in *Jackson* be applied only on an "offense specific" basis.

Lower courts now need guidance in reconciling *Brewer* and *Moulton* with *McNeil* and the offense-specific language in *Jackson*. There is no reason why either *Brewer* or *Moulton* should compel exclusion of the confession here, for neither of those cases involved an admittedly voluntary confession by a suspect who had explicitly waived his *Miranda* rights and agreed to speak with the authorities about an offense different from the one on which he had been arraigned with counsel.

The existing offense-specific rule of *Jackson* and *McNeil*, operating in conjunction with the Fifth Amendment principles of *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981), is fully adequate to protect criminal suspects. The record here demonstrates as much: respondent Cobb, though fully apprised of his right to remain silent, opted to speak with the authorities about murders that he had committed nearly two years earlier. Just because he had confessed to a related burglary some seven months after committing both crimes, and though the trial court had appointed counsel for Cobb on that burglary charge, Cobb remained free to voluntarily speak with authorities about other crimes. No compelling interest of either criminal defendants or the States is served by a rule that bars the police from interrogating a suspect in this situation. The contrary decision of the court below now merits review.

II. The Court Should Grant Certiorari To Resolve The Current Uncertainty Surrounding A Criminal Defendant's Ability To Waive His *Miranda* Rights And Speak With The Police After A Trial Court Has Appointed Counsel For Him.

Besides the important constitutional question concerning the attachment of the right to counsel when one defendant is suspected of committing two distinct crimes (and the practical question concerning the ability of the police to interrogate in that situation once the defendant secures counsel for one of the charges), this case also raises a second significant issue. The court below held that defendant Cobb had "asserted" his right to counsel on any possible murder charges when he did nothing at his arraignment on the burglary charge except agree to the trial court's appointment of a lawyer for him on that latter charge. Pet. App. at A-7. And once that right to counsel on the murder charges attached, said the court, Cobb himself could not waive the right or speak with the police about the murders without first securing the burglary-charge lawyer's permission.

Perhaps a criminal defendant must affirmatively request counsel – as did the accused murderer in *Michigan v. Jackson*, 475 U.S. 625 (1986) – in order to trigger the ban described in that case against any future waiver by the defendant of his right to counsel for police-initiated interrogation. Perhaps instead a defendant's silent acquiescence in a trial court's appointment of counsel for him at his arraignment – the situation here – should lead to the same result, as the court below found. Lower courts are split on the issue, both in Texas and around the country, and the States urge the Court to grant certiorari in this case to resolve the conflict.

A. The Court Has Never Precisely Defined What Constitutes An "Assertion" Of The Right To Counsel.

In *Jackson*, the Court held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 475 U.S. at 636. In so ruling, the Court imported into Sixth Amendment jurisprudence the "prophylactic" rule of *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), which provides, in the Fifth Amendment context, that once an accused in custody expresses his desire to deal with police only through counsel, the accused is no longer subject to further police-initiated interrogation until he secures counsel. *See Jackson*, 475 U.S. at 626. The Court has distinguished the *Jackson* situation – where the accused "ha[d] asked for the help of a lawyer," 475 U.S. at 631 – from those post-indictment police interrogations where the accused "at no time sought to exercise his right to have counsel present." *Patterson v. Illinois*, 487 U.S. 285, 290 (1988). In the former situation, the interrogation is barred absent defense counsel's consent, while in the latter, the defendant may knowingly and intelligently waive his right to counsel at the questioning.

The key distinction, then, between permissible and impermissible post-indictment questioning is the defendant's request for legal assistance. But which side of the line does a case like this fall on, where the accused has not affirmatively requested counsel, but has agreed to a trial court's appointment of counsel for him? Perhaps, as in *Davis v. United States*, 512 U.S. 452, 459 (1994) (interrogation need not stop where suspect "makes a reference to an attorney that is ambiguous or equivocal"), the controlling constitutional principle ought to turn on the suspect's "actual[] request[] [for] an attorney." *Id.* at 462. In any event, clarification of

this issue is of fundamental importance to the States and their law enforcement officers, for now those officers can only guess whether they may accept at face value a defendant's apparently knowing and voluntary willingness to speak with them, or whether they must instead deal only with a lawyer whose help the defendant has never sought.

And the issue is particularly important here, where not only did defendant Cobb fail to affirmatively request counsel at his arraignment or at any other time, but also, that arraignment was of course for a different criminal charge than the one about which the police sought to question him months later once they suspected that he had not only burglarized a home, but had also murdered its two occupants. The right to counsel that the court below afforded Cobb appears to go beyond the limits set in earlier cases, and this case now provides a sound vehicle for addressing the scope and importance of a defendant's "assertion" of his right to counsel at arraignment.

B. Lower Courts Are Divided On The Question.

The lower courts need direction on this issue. Compare *Bradford v. State*, 927 S.W.2d 329, 333-34 (Ark. 1996) (suppressing defendant's statement made after the trial court appointed counsel for him), *cert. denied*, 519 U.S. 1028 (1996); *Dew v. United States*, 558 A.2d 1112, 1116 (D.C. 1989) (finding the record ambiguous as to whether a defendant was represented by counsel when police questioned him after the trial court had appointed counsel for him); and *Holloway v. State*, 780 S.W.2d 787, 795 (Tex. Crim. App. 1989) ("find[ing] no room for the State's argument that the Supreme Court would permit the police-initiated interrogation of an indicted accused who has retained or has been appointed defense counsel"); with *Montoya v. Collins*, 955 F.2d 279, 283 (5th Cir. 1992)

(magistrate's appointment of defense counsel did not bar further police-initiated interrogation), *cert. denied*, 506 U.S. 1036 (1992); *Genry v. State*, 735 So.2d 186, 195-96 (Miss. 1999) (same); *Smith v. State*, 699 So.2d 629, 638-39 (Fla. 1997) (same), *cert. denied*, 523 U.S. 1008 (1998); *State v. Carter*, 664 So.2d 367, 370 (La. 1995) (same).

Within the State of Texas, where this case arose, state and federal courts appear divided. The Fifth Circuit requires "an actual, positive statement or affirmation of the right to counsel" by an accused before his Sixth Amendment right to counsel will attach. *Montoya*, 955 F.2d at 282. "For purposes of *Jackson*, an 'assertion' means some kind of positive statement or other action that informs a reasonable person of the defendant's 'desire to deal with the police only through counsel.'" *Id.* at 283 (quoting *Jackson*, 475 U.S. at 626). Using this definition, the Fifth Circuit determined that Montoya had "never asserted, or invoked, his right to counsel," *id.*, and so his post-arraignment confession to the police was admissible at trial.

In contrast, the state court of appeals in this case held that defendant Cobb had invoked his right to counsel simply by appearing at his arraignment. The uncertainty generated by these differing approaches both within Texas and elsewhere shows that guidance from this Court is needed now on this issue of great importance to the States.

CONCLUSION

For the foregoing reasons, the *amici* States urge the Court to grant the writ.

Respectfully submitted,

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